

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ATLAS CONCRETE CONSTRUCTION CO., INC.

and

Cases 9-CA-35198-2
9-CA-35410

GENERAL DRIVERS, WAREHOUSEMEN AND
HELPERS UNION, LOCAL UNION NO. 89, AN
AFFILIATE OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Andrew L. Lang, Esq.,
for the General Counsel.
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for the Respondent.
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of Louisville, Kentucky,
for the Charging Party.

DECISION

Statement of the Case

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on April 7, 1998 in Louisville, Kentucky upon a complaint issued on December 8, 1997. The charges filed by General Drivers, Warehousemen and Helpers Union, Local No. 89 accuse the Company, Atlas Concrete Construction Company, Inc. with refusing to execute a collective bargaining agreement and with withdrawing its recognition of the Union as the employees' bargaining representative and with refusing to furnish the Union with information about its replacement employees. The Respondent's answer, timely filed, admitted all the jurisdictional allegations in the complaint, but it denied the substantive allegations that the Company had violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Upon consideration of the entire record in this case and having observed the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

The Respondent is engaged in the manufacture and sale of concrete at its Crestwood, Kentucky, facility. With purchases of goods valued in excess of \$50,000 from points outside the state of Kentucky, the Respondent is admittedly an employer engaged in commerce within

the meaning of Section 2(2), (6) and (7) of the Act.

The Union is admittedly a labor organization within the meaning of Section 2(5) of the Act.

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II. The Facts

Atlas Concrete Construction Company and the Union were parties to a collective bargaining agreement effective August 1, 1994 to March 31, 1997 (G.C. Exh. 2). The contract was extended during the subsequent negotiations. Following several unsuccessful bargaining sessions, the Company with the help of a mediator submitted to the Union a verbal proposal on July 28, 1997 contingent upon its ability to continue negotiations. The mediator, Larry Roberts, continued his efforts to mediate the negotiations, and on August 1, 1997, the Respondent submitted a written offer contingent on the company's continued ability to make an offer (G.C. Exh. 3). Upon receiving the Company proposal, John Wientjes, the Union's negotiator, promised Tom Forshee, the Company's negotiator, that he would submit the proposal to the Union membership for ratification. Forshee gave Wientjes the beeper number of Mike Fowler, a Company representative, in order to inform the Company of the outcome of the ratification meeting. Forshee made it clear to the Union that "we'll see you on Monday" if the offer would be ratified (Tr. 24). The Union membership voted to accept the Company's offer on August 1, 1997. Wientjes promptly informed Mike Fowler, the Company operations manager, that the contract proposal had been accepted and that the employees would report for work on Monday. Fowler did not object. The Union also informed Larry Roberts that the offer had been accepted. However, when the employees reported for work on Monday, the Company refused to put them to work because it claimed that there was no work for them.

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The Respondent did not disclose to the Union the reason for the contingency offers, although it had made a reference to a paper which had been served on the Company. However, the Company refused to elaborate on the significance of the paper and the Union was kept in a dark about the fact that the paper was a petition from the employees which ultimately provided the Company with a good faith doubt about the Union's continued majority status.

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The Respondent admittedly withheld certain information requested by the Union about the hiring of replacement workers.

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Analysis

The General Counsel argues that the Company offer of August 1, 1997 was accepted and ratified by the Union and effective on that date, even though the Union had made it clear that its offer was contingent upon its continued ability to continue the negotiations. The Company's refusal to honor the agreement, as well as its refusal to furnish certain information requested by the Union constitute, so argues the General Counsel, violations of Section 8(a)(1) and (5). The Respondent naturally argues that its offer was conditional based upon the continued majority status of the Union among the employees. When the Union was no longer supported by the majority of the employees, the Company did not have the capacity to enter into a collective bargaining agreement.

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The record is clear and the parties stipulated that the Respondent had a good faith doubt as to the Union's continued majority status as of August 5, 1997 based upon a petition of employees (Tr. 8). It is also clear that the Company when making its verbal offer on July 28, 1997 and the written offer of August 1, 1997 had expressed through the mediator that the proposals were conditioned "on the Company's ability to continue negotiations with the Union"

(Tr. 17, 42).

Although the Company had received a petition from the employees on July 28, 1997, it did not verify the accuracy of the signatures and the number of the employees on the petition until August 5, 1997 well after the Union had accepted the contract proposal.

The Respondent did not disclose to the Union during the negotiations on July 28 and August 1 that it had received a petition from the employees, even though the union negotiator Wientjes had inquired about the so called paper. The Company's reacted to the petition by merely telling the Union that the offer was contingent upon its continued ability to negotiate. Parenthetically, I find that the record does not support the Respondent's argument that the Company had referred to its "legal" ability to continue negotiations. The testimony of Tom Forshee and Carol Fowler, Respondent's chief financial officer, was initially consistent with Wientjes' version of the statement, although they subsequently testified that the Company has conditioned its offer on the legal ability to negotiate. I have credited the more reliable and consistent testimony of the three witnesses. The conclusions reached herein would not have been different even if the Respondent had had used the term legal ability.

Both parties rely upon *Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996), where the Court upheld the validity of a bargaining agreement which was negotiated while the Union's majority status was an issue. The Court observed that when the collective bargaining agreement has expired, the Union is entitled to a rebuttable presumption of majority status. An employer may overcome the presumption of majority status by showing that at the time of its refusal to bargain "either (1) the union did not in fact enjoy majority support or (2) the employer had a 'good faith' doubt, founded on a sufficient objective basis of the union's majority." *Auciello Iron Workers*, supra at 520. There, as well as in this case, the Respondent argued that the latter defense can be raised even after a collective bargaining contract period has begun to run upon the union's acceptance of the employer's offer. The Court, however, held "that the Board reasonably found an employer's precontractual, good faith doubt inadequate to support an exception of the conclusive presumption arising at the moment a collective bargaining contract offer has been accepted."

The Court further stated that an employer faced with a good faith doubt has three alternatives, it could have withdrawn the outstanding offer and petition for a representation election, it could have withdrawn the offer and refuse to bargain leaving it to the Union to charge the employer with unfair labor practice or it could have withdrawn the offer and to allow it time to investigate the issue. The Respondent however did not rely upon any of the three options. It made its offer contingent upon its ability to continue negotiations, and argues that it is not bound by the contract even though the Union's acceptance preceded the Company's confirmed doubt of the Union's majority status. Whether a contingency offer adds in effect a fourth option to those enumerated above and renders an acceptance void once the contingency is met, would be the issue here, had the Respondent expressed such a contingency. The record, however, shows that the Respondent made its offer contingent upon an overly broad and vague notion, i.e. its continued ability to negotiate or to make an offer, without any further elaboration or clarification, leaving the other party in doubt whether such a contingency was met or not. It goes without saying that any offer made assumes the party's continued ability to negotiate or to make an offer. When a company is dissolved or a party dies, it no longer has the ability to negotiate and the capacity to make a contract no longer exists. There are a myriad of possibilities why a party to contract negotiations could lose its ability to negotiate. Any offer so conditioned would permit a party to negotiate a contract with the unilateral option to cancel it based upon a subsequent claim that lacked the ability to negotiate. I accordingly find that the Respondent's expressed condition was overly broad and vague and therefore not binding upon

the parties. The Company's expression of contingency did not amount to an effective "condition subsequent" to void the contract. In accordance with the decision in *Auciello Iron Works*, supra, I accordingly find that the Respondent's refusal to honor and execute the collective bargaining agreement and its withdrawal of recognition of the Union violated Section 8(a)(1) and (3) of the Act.

The final issue is the Respondent's refusal to furnish the information requested by the Union in its letter dated August 19, 1997, i.e. "the names and dates of all replacement workers. . . hired during the strike of Atlas Concrete" (G.C. Exh. 1, A). The Respondent admitted in its answer its refusal to furnish the requested information (G.C. Exh. 1(S)). The Union explained the need for the information. That information was needed for the Union to assess its bargaining position during the negotiations and to enable the Union to contact the replacement workers to inform them about the Union benefits.

It is axiomatic that the Union is entitled to the information which is reasonably necessary and relevant to the performance of its duties as a collective bargaining representative. The Respondent has not contested the issue and I find that its failure to furnish the requested information violated Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. The Respondent Atlas Concrete Construction Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Since about August 1, 1994, the Union has been the exclusive collective bargaining representative of the following unit appropriate for the purposes of collective bargaining

All ready mix drivers, batchmen/loader operators, yardmen, conveyor employees, beltmen, mechanics and lead mechanics employed at [Respondent's] Crestwood, Kentucky facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

4. On August 1, 1997, the Union and Respondent reached an agreement on terms and conditions of employment of the Unit in a collective bargaining agreement.

5. The Respondent's failure and refusal to execute and abide by the agreement constitutes a violation of Section 8(a)(1) and (5) of the Act.

6. During the term of the collective bargaining agreement the Union is entitled to a conclusive presumption of majority status, so that the Company's withdrawal of recognition of the Union constitutes a violation of Section 8(a)(1) and (5) of the Act.

7. The Respondent's failure to provide the information requested by the Union which is necessary for its duties as collective bargaining agent violates Section 8(a)(1) and (5) of the Act.

8. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent engaged in the unfair labor practices, the Employer must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To rectify the Employer's unlawful failure to sign and implement a collective bargaining agreement, and its withdrawal of recognition, is necessary to order the Employer, upon the Union's request, to reduce to writing, sign, and retroactively implement the collective bargaining agreement effective August 1, 1997.

The Employer must make whole all employees to whom the aforesaid collective bargaining agreement applies for any loss of wages and other benefits suffered as a result of the Employer's failure to sign and implement the agreement. Those wages and benefits, if any, shall be computed in accordance with the Board's formula in *Ogle Protection Service*, 183 NLRB 682 (1970)), with interest computed under *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, the order will require the Employer to refrain from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights which the Act guarantees.

Finally, the Employer will be ordered to post an appropriate notice to employees.

On the above findings of fact, conclusions of law, and the entire record, I issue the following recommended¹

ORDER

The Respondent, Atlas Concrete Construction Co., Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition of the Union as the exclusive collective bargaining representative of employees in the bargaining unit found appropriate.

(b) Failing and refusing to sign and implement the collective bargaining agreement which has been found to have been created on August 1, 1997.

(c) Failing and refusing to furnish the information requested by the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Furnish the Union the information requested by letter of August 19, 1997.

(b) On the Union's request, reduce to writing, sign, and implement retroactively to August 1, 1997, the collective bargaining agreement which the Union accepted on that date.

(c) Make whole all employees to whom the August 1, 1997, collective bargaining agreement applies, including such employees who may have left the payroll since that date, for any loss of wages or other benefits suffered by reason of the Employer's failure to sign that collective bargaining agreement and its withdrawal of recognition from the Union. Monies due under this make whole provision are to be computed according to the formulas described in the remedy section above.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and relevant to determine the amounts owing under the terms of this Order.

(e) Within 14 days after service by the Region post at its Crestwood, Kentucky facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 22, 1998.

Karl H. Buschmann
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition of the Union as the exclusive collective bargaining representative of employees in the bargaining unit found appropriate.

WE WILL NOT fail and refuse to sign and implement the collective bargaining agreement which has been found to have been created on August 1, 1997.

WE WILL NOT fail and refuse to furnish the information requested by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish the Union the information requested by letter of August 19, 1997.

WE WILL on the Union's request, reduce to writing, sign, and implement retroactively to August 1, 1997, the collective bargaining agreement which the Union accepted on that date.

WE WILL make whole all employees to whom the August 1, 1997, collective bargaining agreement applies, including such employees who may have left the payroll since that date, for any loss of wages or other benefits suffered by reason of the Employer's failure to sign that

collective bargaining agreement and its withdrawal of recognition from the Union. Monies due under this make whole provision are to be computed according to the formulas described in the remedy section above.

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ATLAS CONCRETE CONSTRUCTION CO.

(Employer)

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Dated _____ By _____
(Representative) (Title)

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This is an official notice and must not be defaced by anyone.

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This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street, Room 3003, Cincinnati, Ohio 45202-3271, Telephone 513-684-3663.

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